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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-897

HARRY B. STONER and STONER INVESTMENTS, INC., a Delaware Corporation,

Petitioners,

vs.

THE VENDO COMPANY, a Missouri Corporation,

Respondent.

REPLY BRIEF FOR PETITIONERS

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May It Please The Court:

I.

Respondent's Statement Of The Case (Resp. Br. pp. 3-7) is inaccurate. From it one would conclude that from the beginning, the parties litigated a breach of a fiduciary duty

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Note: Italics ours unless otherwise noted herein.
Resp. Br. refers to Respondent's Brief.
Pet. refers to Petitioners' Petition.

by a director amounting to a diversion of a corporate opportunity. Thus Respondent speaks of "The Pleadings and Proof of Fiduciary Duty" (p. 3). To support its statement, Respondent refers to the argument of Petitioners' counsel on the Motion to Vacate on May 12, 1967, quoting words out of context (p. 3). The point of that argument was that "*the fiduciary duties of a director generally*" could not form the basis of liability; that "there is not a word in this complaint about 'fiduciary duties' and . . . this complaint is predicated solely upon the provisions of these two contracts" (A. 497); that it is essential that there be pleadings to support a judgment (A. 507-08); that Vendo "must recover upon the contract sued upon (a)nd the measure of defendants' liabilities must be based upon the alleged violations of that contract"; that "they can have it only the way they pleaded it" (A. 508) and that "suppose they wanted to amend, we'd want to re-plead, of course . . . ." (A. 512). The foregoing quoted words from that argument of Petitioners' counsel, Respondent omits.

Respondent did not amend its complaint (Pet. pp. 15, 16). Not only that, it ignored the Appellate Court's mandate with respect to the damages recoverable under the allegations of that complaint (Pet. pp. 16, 17). Quoting the Illinois Supreme Court (Resp. Br. pp. 4, 5) only makes it more evident that that Court equates a complaint alleging the breach of a covenant not to compete and damages resulting therefrom through the wrongful competition of a competitor, with the unpleaded breach of a fiduciary duty of a director amounting to the misappropriation of a corporate opportunity. We have mentioned the obvious differences in legal theories, issues, defenses and measure of damages between the two theories (Pet. pp. 19, 20).

And while, as the Supreme Court of Illinois says, "Plaintiff made its theory quite explicit in the trial on remand" (Resp. Br. p. 5), that Court does not mention that Petitioners consistently objected to evidence adduced on that theory (Pet. p. 8, fn.). Further, it would be novel doctrine indeed if "an appellee may defend a judgment below on any ground appearing of record" (Resp. Br. p. 5) if the result was, as here, a denial of procedural due process (Pet. pp. 17, 18).

As to the Supreme Court's granting "Vendo's motion to amend the pleadings to conform to the proof" (Resp. Br. p. 5), we pointed out on Petition for Rehearing that the proof did not support the amendment: that, given the opportunity, "we could easily have proved the falsity of" certain allegations in the amendment: and that there was evidence in the record contrary to the amendment (App. G 11, 12).

Respondent wrenches from context (Resp. Br. 4) the only reference to the word "fiduciary" in the more than thirty pages of the first Appellate Court opinion: ". . . such a breach of Stoner's fiduciary undertaking *as an employee* . . . requires a forfeiture of salary" (App. B 288). The "such a breach" obviously refers to "breach of the covenants not to compete," which is referred to in the immediately preceding sentence. The rest of the opinion deals solely with the validity of the covenants (App. A 281-85), the time period during which they were valid (App. A 285-86), whether defendants' activities were proscribed by the terms of the covenants (App. A 286-87), and the measure of damages "for the breach of a covenant not to compete" (App. A 287, 290), i.e., the damages caused by defendants' *"wrongful competition"* (App. A 291), obviously

through the instrumentality of Lektro-Vend Corp., as alleged in the complaint (Pet. 5).

We never argued to the Illinois Supreme Court that "a possible violation of due process was at issue" (Resp. Br. p. 4) because we had no reasonable basis to anticipate that that Court would countenance Respondent's blatant violation of the law of the case governing the retrial and then deny us a hearing on the revised liability and measure of damages. The critical part of the Illinois Supreme Court's opinion, which Respondent overlooks, states (App. F 306):

> "Defendants assert that the evidence introduced by plaintiff on the remand and the theory on which it was offered did not comport with the law of the case as established by the first opinion of the appellate court nor with the court's mandate. Plaintiff disputes defendants' interpretation of the first opinion of the appellate court. *We need not consider this point, however, since the doctrine of the law of the case is not applicable to this court in reviewing the judgment of the appellate court.*"

The point is that this ignores the fact that *the law of the case and mandate of the Appellate Court were binding upon the parties and the trial court upon the retrial!* Petitioners do not and cannot deny that a state supreme court is unfettered by the commands of its inferiors. But it cannot *retroactively* change the liability and measure of damages governing a trial without affording a party who was bound thereby a new trial on the factual and legal issues involved in such retroactive change.

Respondent's treatment of "The Illinois Antitrust Defense and Counterclaim" (Resp. Br. pp. 5-7) is also inaccurate. In characterizing Petitioners' counterclaim, Respondent refers only to "the 1959 covenants and Vendo's

efforts to enforce them" (Resp. Br. p. 5), completely ignoring that its efforts to enforce them commenced in August of 1965, *after* the effective date of the 1965 Illinois Antitrust Act, and ignoring completely the allegations in that counterclaim with respect to the acts committed by Respondent *after* the effective date of the 1965 Act in clear violation of its provisions (Pet. p. 21). The Appellate Court said, contrary to the counterclaim, that "nowhere have Defendants pleaded or argued that the commerce involved here is anything but interstate" (App. B 298). It then held that, because both parties' business was interstate, federal preemption applied (App. B 297, 298). This prompted the Illinois Attorney General to file *amicus* briefs in the Illinois Supreme Court and the Appellate Court, wherein he urged that the result of the decision would be to frustrate his ability to enforce the Illinois Antitrust Act against companies doing business in interstate commerce (See Pet. 14).

Thus, Respondent's references were hardly "the only ones to appear in the Appellate Court opinions" (Resp. Br. p. 7). The fact that certain critical allegations of the defenses and counterclaim were not repeated in these court opinions, which we suggested were "substantially correct" (Resp. Br. p. 7), does not refute that those allegations were clearly pleaded, nor that Petitioners were denied a trial upon alleged acts which occurred after the effective date of the 1965 Illinois Antitrust Act!

II.

Respondent argues that "By Petitioners' own admission, the alleged constitutional issues have neither been raised properly nor decided by the Illinois Supreme Court" (Resp. Br. pp. 8-10). Respondent's assertion that no "constitu-

tional issues of due process of law were . . . raised in the State court until [Petitioners'] Petition for Rehearing" (Resp. Br. p. 8), is belied by the footnote on page 12 of our Petition here that "Petitioners argued throughout that because the trial court held it had no jurisdiction to hear their claims because of Article VI (preemption) they were denied substantive due process because those claims involving only intrastate commerce had not been heard on their merits." We raised this federal constitutional claim in the Illinois Supreme Court and pointed out on Petition for Rehearing that we had done so (App. G 33). The Illinois Supreme Court skirted the issue, holding that the State Antitrust Act could not be applied retroactively, certainly an adjudication Petitioners were not bound to anticipate, in view of hornbook law to the contrary (Pet. 21-23). Nor were we bound to anticipate that the Supreme Court would retroactively change the law of the case which governed the trial without affording Petitioners an opportunity to be heard upon the new issues upon which the judgment for liability and damage was entered. This has been settled Illinois practice and "federal fundamental requirement of due process" (Pet. p. 17 and footnote).

III.

As to the decision of the Illinois Supreme Court resting upon independent state grounds (Resp. Br. 10, 11), no state court decision which denies due process and is arbitrary and capricious can be justified on "adequate independent state grounds."

Nor did Petitioners misrepresent the record to the Illinois Supreme Court (Resp. Br. 11). The counterclaim "sought damages for acts of the plaintiff only from 1965 on"

(App. G 14). Obviously, the allegations of paragraph 7a of the counterclaim to which Respondent refers (Resp. Br. 11) are laid by way of inducement to show the anti-competitive character of the contract Respondent was seeking to enforce, in violation of the 1965 Act. Further, if any part of the counterclaim states a cause of action, it is not subject to being stricken and relief denied for acts performed after the 1965 Act and patently in violation of the criminal provisions of that Act. If this is modifying the record "in fairy tale fashion" (Resp. Br. 11), then corporations with contracts having a congenital infirmity executed prior to the 1965 Act (Pet. 22) are immune from the criminal provisions and treble damage provisions of the 1965 Act for *all acts* committed by them after passage of that Act.

IV.

Respondent never comes to grips with our contention that the record upon which the Illinois Supreme Court affirmed the $7,345,500 damages award did not rationally justify that result. Rather, Respondent merely asserts that the judgment finds "overwhelming" support in the record, and "invites" this Court to "read the opinion of the Illinois Supreme Court" (Resp. Br. pp. 11-12). Nowhere does Respondent challenge the facts we stated and argued (Pet. 23-30).

Mere reading of that opinion sidesteps the point, which is that the *evidence* does not support it. The basic rationale of that opinion is that, had Stoner disclosed his interest in the Lektro-Vend Machine, Vendo may have dealt with Phillips "directly or through some other agent" and that the Court "cannot say that Vendo would have declined an of-

fer to purchase the Lektro-Vend or to seek to develop such a machine itself, had a genuine offer to do so been extended to it" (App. F 306). We described this "as pure speculation and conjecture," which indeed it is (Pet. 25, 26). We failed to mention that, when Stoner received the letter (PX 31) from Childers (Vendo's President) of April 9, 1963, making a counter-offer to purchase the Lektro-Vend, he, Stoner, called Childers back ". . . *to ask if he had a specific figure in mind that he wanted me to talk to Rod Phillips about*" and that Childers said, "*No, we just can't see any market for it. It's too expensive a machine*" (Vol. II, A. 1152). Childers did not deny that testimony. He was not even a witness at that trial. This testimony further confirms "the plain unvarnished facts" (Pet. 26, 27).*

Respondent's attempt to distinguish two of the three cases we cited falls short (Resp. Br. 12). The *principle* enunciated in *Schware* and *Konigsberg,* not to mention *Thompson* (Pet. p. 24), cannot be limited to any class of cases, but applies whenever findings are wholly devoid of rational evidence to support them. Many other cases from this Court support that doctrine. It is no answer to say that the judgment here was affirmed "entirely upon state grounds" (Resp. Br. 12). It is not the facade of the opinion sustaining the state court judgment, but the reality of the record that governs federal review to secure federally protected rights of due process (Pet. 17, 18, 22, 23).

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* We could have offered other evidence had we known we were in a trial involving the misappropriation of a corporate opportunity (Pet. 19, 20).

CONCLUSION

We too are aware of "the work load" of this Court (Resp. Br. 12). We are not urging "this Court to consider constitutional issues raised as an *afterthought* . . . ." (Resp. Br. 2).

Rather, we respectfully submit that the Petition raises serious constitutional questions going to the very heart of the judicial process, involving elemental principles in the administration of civil justice. Therefore, we again pray the Petition be granted for the reasons stated therein.

Respectfully submitted,

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